UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
John Cummings,

Charging Party,
v.

Dedham Housing Authority,

Respondent

HUDALJ 01-90-0424-1
Decision Issued: February 4, 1992

INITIAL DECISION ON REMAND AND ORDER

By Order dated December 13, 1991, the Secretary of the Department of Housing and Urban Development remanded the Initial Decision and Order in the above-captioned case to permit consideration of the Charging Party's Motion for Partial Reconsideration[1] and any opposition thereto. Respondent timely filed an opposition to the Motion on January 8, 1992.[2]

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[1]Additional exhibits in the form of "attachments" are appended to the Motion for Partial Reconsideration. One of these exhibits is the decision of the United States District Court in *U.S. v. Borough of Audubon, New Jersey*. The other exhibits are evidentiary in nature. As there has been no showing that the evidentiary submissions are new and material and were not readily available before the end of the hearing, they have not been considered. *See* 24 C.F.R. Sec. 104.810.

[2]Respondent argues that this tribunal is without jurisdiction to consider the Charging Party's Motion for Reconsideration, pointing out that such a motion is not provided for under the regulations. This issue need not be addressed because the Secretary has remanded the Initial Decision for

The Charging Party takes issue with that part of the Initial Decision and Order which declines to award a civil penalty against Respondent.[3] The Initial Decision and Order relies upon two grounds in reaching that result; first, that there was considerable doubt that an award would have a deterrent effect on the discriminating officials and, second, that a civil penalty may have an adverse effect on Respondent's tenants.

Summary of Initial Decision and Order

Respondent, Dedham Housing Authority, ("Dedham") is a public housing authority established under Chapter 121B of the Massachusetts General Laws for the purpose of, *inter alia*, providing housing for families or elderly persons of low income. It depends on public receipts and rentals for its funding. It is run by a five-person Board of Commissioners, one of whom is appointed by the Governor, and four of whom are elected. Doggett Circle is one of six projects managed by Respondent. It consists of 80 units and has a parking lot which, in the summer of 1990, had 34 spaces. After 6:00 p.m. ten additional spaces become available across the street. Three of these spaces are allocated for handicapped parking. Parking is not assigned; rather it is made available on a "first come, first served" basis.

Complainant, John Cummings, suffers from chronic heart disease and severe peripheral vascular disease which limits his ambulatory ability. He can only walk short distances without rest, experiences chest pain when he walks more than 15 to 20 feet, feels "fuzzyheaded" when he walks more than 30 feet. He has experienced two heart attacks.

Despite possessing handicap license plates, Mr. Cummings was unable to find available parking near his apartment. Even the designated handicap spaces were occupied by others also having handicap license plates. Because of the pain he

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further consideration. See 24 C.F.R. Sec. 104.930.

[3]The Charging Party asserts that the decision fails to follow applicable precedent and violates 24 C.F.R. Sec. 104.910(a) by relying upon matters not in the record in reaching this result. Respondent states that the decision was correctly decided on this issue based on existing case law and public policy and that the conclusion reached regarding the special circumstances applicable to public housing authorities is fairly inferred from the facts in the record and the laws applicable to public housing authorities in Massachusetts.

experienced walking longer distances when he could not park near his apartment, Mr. Cummings often parked illegally in the fire lane because it was close to his apartment. Mr. Cummings complained about his situation to the Massachusetts Office of Handicapped Affairs. On May 22, 1990, that office wrote Respondent on Mr. Cummings' behalf requesting that one of the handicap spaces be reserved. Attached to the request was a copy of HUD regulations requiring a landlord to provide reasonable accommodations for tenants with handicaps and providing, as an example, the assignment of a parking space to mobility-impaired tenants. Through its attorney Respondent denied the request and added a warning that illegal parking by Mr. Cummings would result in towing. Mr. Cummings then informed Respondent that he would be willing to accept any reserved space close to his apartment. This request was also denied. He filed a complaint of discrimination with HUD. Replying to the discrimination complaint, Respondent asserted that it had denied his requests because of insufficient parking spaces.

Contrary to Respondent's claim, I found that Respondent failed to demonstrate that it had an insufficient number of spaces available to accommodate Mr. Cummings or that it would be forced to abandon its "first come, first served" rule as to the other spaces if it granted his request for a reserved parking space close to his apartment. Having found that Respondent was required to accommodate Mr. Cummings' handicap, I determined that Respondent violated 42 U.S.C. Secs. 3604(f)(2); 3604(f)(3)(b) and 24 C.F.R. Secs. 100.202(b) and 100.204.

As compensation, I awarded Mr. Cummings $1,600 for physical pain; $10,000 for emotional distress; and $500 for inconvenience. Both Mr. Cummings and the Charging Party were awarded appropriate injunctive relief. However, I declined to award a civil penalty. For the reasons set forth below, I reverse that part of the Initial Decision and Order.

Civil Penalties

The Act authorizes an administrative law judge to impose a maximum civil penalty in the amount of $10,000 against a respondent who, like Respondent, has not been adjudged to have committed a prior discriminatory housing practice. 42 U.S.C. Sec. 3612(g)(3)(A). Addressing the factors to be considered when assessing a civil penalty under 42 U.S.C. Sec. 3612 (g)(3), the House Report on the Fair Housing Amendments Act of 1988 states:

> The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in

> every case. When determining the amount of a penalty against a Respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstances of that Respondent and the goal of deterrence, and other matters as justice may require.

H. Rep. No. 100-711, 100th Cong., 2d Sess. 37 (1988).

Nature and Circumstances of the Violation and Degree of Culpability

The record demonstrates that Respondent's failure to accommodate Mr. Cummings' handicap was made with knowledge of Mr. Cummings' physical limitations, with a callous disregard for those limitations, and in the face of clear guidance to the contrary from the Massachusetts Office of Handicapped Affairs. Respondent's decision cannot be justified by the alleged necessity of maintaining its "first come, first served" policy, since this policy would not have been significantly affected by granting the request. Accordingly, under these circumstances I find that Respondent knowingly made an unlawful decision which had a serious detrimental effect on Mr. Cummings.

Respondent had at least two opportunities to reconsider the probity and legality of its actions. Despite these opportunities, it persisted in the face of what should have appeared to be clear guidance to the contrary. The first opportunity occurred when the Massachusetts Office of Handicapped Affairs notified Respondent of HUD's Fair Housing Act Regulations. The regulations contain as an example of unlawful conduct the failure to accommodate a mobility-impaired individual by reserving a parking space near his apartment. 24 C.F.R. Sec. 100.204(b)(Example 2). The example describes the same situation presented to Respondent with one exception. As Respondent points out, the example does not deal with the problem posed by a shortage of available parking. However, at the time Respondent initially denied the space to Mr. Cummings there was no shortage of parking at Doggett Circle, even if the spaces in the medical facility across the street are not counted. Thus, the example is apposite. Respondent's Executive Director, Ms. Luna, testified that she had read the regulations and the example. Tr. p. 227.[4] She also knew of Mr. Cummings' mobility limitations. Tr. p. 224. Unlike

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[4]The following reference abbreviations are used in this decision: "Sec." for the Charging Party; "Res." for Respondent; and "Tr." for transcript.

situations where the law is ambiguous or there is little precedent, clear guidance existed here,[5] and this guidance was known to Respondent.[6]

Respondent's Financial Circumstances and Deterrence

Respondent contends that, because it is a public housing authority which receives public funding, sound public policy requires that it be exempt from the assessment of any civil penalty. It contends that any penalty will "show up in the form of diminished facilities and services." The authority would be required to eliminate certain items such as "maintenance, repairs, or improvements from its budget." Accordingly, Respondent's innocent tenants rather than Respondent would be penalized. Res. Brief, p. 13. Additionally, Respondent points out that the imposition of a civil penalty will result in Respondent seeking additional funds from the Federal Government to replace the assessment. *Id.* at 14. As Respondent additionally points out in its Opposition brief, a public housing authority is unable to raise its own revenue through taxes or raise rents to offset a shortfall. Respondent's Opposition to the Secretary's Motion for Partial Reconsideration, p. 4.

The Charging Party notes that there is no exemption for public housing authorities in 24 U.S.C. Sec. 3612(g)(3), the statute which authorizes civil penalties, nor is there a mention of such an exemption in the legislative history of the Act. Sec. Brief, p. 21, *citing* H.R. Rep. No. 711 at 37, *reprinted in* 1988 *U.S. Code and Admin. News* 2198. The Charging Party also cites *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) for the proposition that where a statute has not specifically authorized punitive damages and civil penalties against public housing authorities, such awards are not appropriate. HUD contends that the Act, unlike the statute in *Newport*, specifically authorizes civil

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[5]Cf. *Secretary v. HUD v. Murphy*, Fair Housing-Fair Lending (PH), para. 25,002 at 25,017 (July 13, 1990). In that case "Respondents were confronted with the difficult task of interpreting a new, complex statute and regulations that set forth those requirements. Thus, under the circumstances, Respondent's actions were not entirely without reason, and constituted a good faith attempt to comply with the spirit and intent of the regulations. *Id.* at 25,059.

[6]Ms. Luna also had received formal training in the reasonable accommodations requirements under Section 504 of the Rehabilitation Act of 1973. Tr. pp. 197, 225.

penalties. Accordingly, the Charging Party contends that no grounds exist for exempting public housing authorities from the assessment of civil penalties and, in its Motion for Partial Reconsideration, adds that there is no evidence in the record that a civil penalty would not have a deterrent effect on public officials who discriminate, including Respondent's Board, or would have an adverse effect on Respondent's tenants.

The Charging Party correctly reads the Act to authorize the assessment of civil penalties against a public housing authority. However, like any award of a civil penalty under the Act, any assessment is discretionary.

Whether Respondent will actually be deterred by the award of a civil penalty is not demonstrated by the record.[7] However, prior case law recognizes that deterrence of other

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[7]In *Newport*, the Supreme Court recognized three reasons why it is doubtful that an award of punitive damages would deter future acts by public officials. 453 U.S. at 268. These are: 1) the possibility of indemnification relieving the official of having to face the financial consequences of his or her actions; 2) the lack of any demonstration that punitive damages are no more likely than a damage award to result in the voters turning out the public official; and 3) the fact that personal liability would be more likely to deter officials than would an award from which the officials are financially insulated. This reasoning is as applicable to the officers of public housing authorities as it is to municipal officials and to awards of civil penalties as much as it is to punitive damage awards. Yet, civil penalties have recently been imposed by a United States District Court against a municipality for violations of the Act. *United States v. Borough of Audubon, New Jersey*, Civil Action No. 90-3771 (D.N.J. September 9, 1991).

I revise my prior ruling because upon reconsideration I conclude that Respondent has not demonstrated that the *Newport* considerations apply to Respondent's governing officials, and because the Initial Decision did not give sufficient weight to the principle of *general* deterrence, a legitimate justification for a civil penalty.

Although, this decision is not likely to have a deterrent effect on public officials who are insulated from the consequences of their actions, to the extent public housing officials are held accountable, this decision will demonstrate to them and to other housing providers that unreasonable

housing providers, i.e., general deterrence, is a permissible consideration. *See, Secretary of HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) 25,001 at 25,015 (Dec. 12, 1989); *affd* 908 F.2d 864 (11th Cir. 1990); *Secretary of HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) 25,005 at 25,092 (Sep. 28, 1990) ; *Secretary of HUD v. Morgan*, Fair Housing-Fair Lending (P-H) 25,008 at 25,141 (July 25, 1991). Regardless of the effect such an award might have on Respondent, I conclude that a salutary deterrent effect on other housing providers will result from a civil penalty assessment.

An assessment of a civil penalty might affect the funding available for the project, hence, for the facilities and services available to tenants. In Massachusetts public housing authorities are dependent on public funding and are prohibited from changing rental rates which are set according to a statutory formula. Mass. G.L. c. 121B. Secs. 17, 32; *Commesso v. Hingham Housing Authority* 399 Mass. 805, 507 N.E.2d 247 (Mass. 1987). The assessment of a civil penalty might even affect innocent tenants so seriously as to militate totally against its imposition. However, Respondent has not made this demonstration. The record is silent as to whether sufficient funds are available to Respondent to pay a penalty of $10,000 without compromising the quality of available facilities and services. As with other evidence of financial circumstances, it is peculiarly within Respondent's sphere of knowledge. *Campbell v. United States*, 365 U.S. 85, 96 (1961); *Secretary of HUD v. Jerrard, supra* at 25,092; *Secretary v. Morgan, supra* at 15,141; *Secretary of HUD v. Properties Unlimited*, Fair Housing-Fair Lending (P-H) 25,009 at 25,153 (Aug. 5, 1991); *Secretary of HUD v. George*, Fair Housing-Fair Lending (P-H) 25,101 at 25,169 (Aug. 16, 1991). Based upon the lack of evidence of the impact any assessment would have on its tenants, I conclude that the maximum civil penalty may be imposed if other factors justifying it are present. I conclude, that these other factors are indeed present.

Accordingly, the seriousness of Respondent's acts, the degree of culpability, the deterrent effect of a civil penalty, and the lack of evidence of Respondent's inability to pay or of the effect such payment would have on innocent tenants, cause me to reverse, in part, the Initial Decision and Order in this matter and conclude that a civil penalty in the amount of $10,000 is appropriate under the circumstances of this case.

ORDER

In addition to the relief granted in the Initial Decision and Order, it is further ORDERED that

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failures to accommodate handicaps can result in a payout of more than actual damages.

within forty-five (45) days of the date on which this Initial Decision on Remand and Order becomes final, Respondent shall pay a civil penalty to the United States in the amount of $10,000.

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WILLIAM C. CREGAR
Administrative Law Judge

Dated: February 4, 1992

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by WILLIAM C. CREGAR, Administrative Law Judge, HUDALJ 01-90-0424-1, were sent to the following parties on this 4th day of February, 1992, in the manner indicated:

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